

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

MAX BIRMINGHAM,

Plaintiff,

v

DANA NESSEL,

Defendant.

No. 1:20-cv-00329

HON. JANET T. NEFF

MAG. PHILLIP J. GREEN

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**DEFENDANT'S MOTION TO STRIKE**  
**"BRIEF OF PLAINTIFF-APPELLANT"**

Defendant Dana Nessel, by counsel, moves that this Court strike Plaintiff

Max Birmingham's 42-page "Appeal from the Magistrate Judge of the United States

District Court for the Western District of Michigan.” (ECF No. 39, PageID.366.)

Birmingham’s brief should be struck for the following reasons:

1. On September 16, 2020, Magistrate Phillip Green served a copy of his Report and Recommendation that Birmingham’s complaint be dismissed because Birmingham lacks standing and has not shown an injury in fact. (ECF No. 37, PageID.362.)

2. Federal law, and the Federal Rules of Civil Procedure, permit Birmingham fourteen days to file written objections to the report and recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2).

3. Birmingham was notified of this deadline by Magistrate Green. (ECF No. 37, PageID.363.)

4. There is no rule that permits an appeal of a Magistrate Judge’s Report and Recommendation to the District Court.

5. The rules allow only for timely, specific, written objections to a report and recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2).

6. Birmingham’s notice of appeal, filed on September 16, 2020, does not contain any specific objection. (ECF No. 38, PageID.364.)

7. The Sixth Circuit has held that “[t]he filing of vague, general, or conclusory objections” to a magistrate judge’s report and recommendation “does not meet the requirement of specific objections and is tantamount to a complete failure to object.” *Cole v. Yukins*, 7 F. App’x 354, 356 (6th Cir. 2001) (citing *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995)).

8. Birmingham's "brief" was filed 19 days late, with no explanation of why it was late.

9. "When no *timely* objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *See* Fed. R. Civ. P. 72 Advisory Comm. Note Subdivision (b) (emphasis added).

10. Birmingham's brief should also be struck because it exceeds the word limit placed on briefs by this Court. W.D. MI L.R. 7.2(b)(i), 7.3(b)(i).

11. Birmingham suggests that he could have standing if he amends his complaint, but his proposed amendment would be futile.

12. It has long been held that "leave to amend may be denied where the amendment would be futile." *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 569 (6th Cir. 2003) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

13. Counsel for Defendant contacted Plaintiff for concurrence pursuant to W.D. MI L.R. 7.1(d), but as of the time of filing this motion concurrence was not received.

WHEREFORE, for the reasons stated above and more fully in the accompanying brief, Attorney General Dana Nessel respectfully requests that this Honorable Court strike Birmingham's brief as he is not permitted to appeal the Report and Recommendation, hold that Birmingham has not filed proper or timely objections, review the Report and Recommendation for clear error on the face of the record, and adopt the Report and Recommendation. In the alternative, and if this

Court permits exceptionally late objections, these objections should be limited to 4,300 words and Defendant should be permitted fourteen days to respond to proper objections.

Respectfully submitted,

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Dated: October 29, 2020

### **CERTIFICATE OF SERVICE**

I hereby certify that on October 29, 2020, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel and parties of record.

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